Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-515

FEHR BROTHERS, INC.,
Petitioner,

v.

ACCIAIERIE WEISSENFELS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Constitutional Provisions, Statutes and Rules of Court Involved	2
Statement of the Case	3
Argument	5
I. Petitioner Has Standing to Request Certiorari	5
II. The Majority Opinion of the Eighth Circuit Is in Conflict With the Applicable Decisions of the Arkansas Supreme Court	6
III. The Majority Opinion Is in Direct Conflict With the Decisions of Other Circuits	10
IV. The Majority Opinion Has the Effect of Declaring Arkansas Stats. Ann. § 27-2502(c)(1)(d) Unconstitutional	13
Conclusion	15
Appendix 9—En banc Opinion of Circuit Court	A-1
Appendix B—Original Opinion of Circuit Court	A-17
Appendix C—Opinion of U. S. District Court	A-30
Appendix D—Constitutional Provisions, Statutes and Rules of Court Involved	A-35

AUTHORITIES

Cases:

Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 817 (4th Cir. 1972), certiorari denied, 411 U.S. 966, 36 L.Ed. 2d 687, 93 S.Ct. 2148 11

Anderson v. National Presto Industries, 257 Iowa 911, 135 N.W.2d 639 (1965) 8, 9

Atkins v. Jones & Lofton Steel Company, 258 Minn. 571, 104 N.W.2d 888 (1960) 9

Blum v. Kawaguchi Ltd., 331 F.Supp. 216 (W.D. Neb. 1971) 13

Dertz v. Pasquina, 15 Ill. App. 3, 470, 305 N.E.2d 54 .. 6

Dulin v. Circle F Industries, Inc., 558 F.2d 456 (8th Cir. 1977) 5

Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969) 11, 12

Eltin v. Ava Truck Leasing, Inc., 100 N.J. Super 515, 242 A.2d 663, affirmed in part, reversed in part; 53 N.J. 463, 251 A.2d 278 6

Emmons v. Agricultural Ins. Co., 245 La. 411, 158 So. 2d 594 6

Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969) 11, 12

Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 ..... 8, 9

Hanson v,. Denckla, 357 U.S. 235, 2 L.Ed. 1283, 78 S. Ct. 1228 (1958) 14

Hetrick v. American Honda Motor, Inc., 429 F.Supp. 116 (D.C. Neb. 1976) 13

Honeywell, Inc. v. Metz Apparatewerke, 509 F2d 1137 (7th Cir. 1975) 11

International Harvester v. Hendrickson Manufacturing Company, 249 Ark. 298, 459 S.W.2d 62, 64-65 (1970) 6, 8

International Shoe Company v. State of Washington, 316 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 14

Metal-Matic, Inc. v. Eighth Judicial District, 415 Pac.2d 617 (1966), Nev. 9

Nix v. Dunavant, 249 Ark. 641, 460 S.W.2d 762, 764-765 (1970) 6

Pennsalt Chemical Corp. v. Crown Cork & Seal Co., 426 S.W.2d 417, 419-22 (1968) 6

Reiley v. P. J. Wolff & Sohne, 374 F.Supp. 775 (D.C. N.J. 1974) 9, 13

Constitutional Provisions:

United States Constitution:

Fourteenth Amendment 2

Statutes:

Federal Statutes:

28 U.S.C. § 1254 2

28 U.S.C. § 1292(b) 3

Arkansas Statutes:

Ark. Stat. Ann. § 34-1001 5

Ark. Stat. Ann. § 27-2502(c)(1)(d) 2, 3, 7, 13

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OPINIONS BELOW

Petitioners seek a writ of certiorari from a final judgment of the Eighth Circuit Court of Appeals, filed August 18, 1978, dismissing the complaint of Plaintiffs Woodrow Hutson and John David Epperson against Defendant-Appellant, Acciaierie Weissenfels. A copy of the opinion of the Eighth Circuit is appended to this Petition. No official report of the Court's opinion has been printed as of the date this Petition is filed. (App. No. A).

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 *U.S.C.* 1254. Petitioners seek review of a judgment of the Eighth Circuit Court of Appeals entered en-banc on August 18, 1978 with three justices dissenting from the Court's opinion.

QUESTIONS PRESENTED FOR REVIEW

Did the Eighth Circuit Court of Appeals Err in Holding that Respondent Acciaierie Weissenfels Was, by Virtue of the Due Process Clause of the Fourteenth Amendment, Not Subject to In Personam Jurisdiction in the State of Arkansas?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause involves the Application of the Due Process Clause of Section I of the 14th Amendment to the United States Constitution to *Ark. Stat. Ann.* § 27-2502 (c)(1)(d), the Arkansas "long arm" statute.

A. Section 1 of the 14th Amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

B. *Ark. Stat. Ann.* § 27-2502 (c)(1)(d) provides:

> 1. A Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's

> . . . (d) causing tortious injury in this State by an act or omission outside this State, if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State." (*See* App. D).

STATEMENT OF THE CASE

This cause is an action for personal injuries filed by Plaintiffs Woodrow Hutson and John David Epperson against Defendants Fehr Brothers, Inc. and Acciaierie Weissenfels in the United States District Court of Arkansas, Texarkana Division. The accident in question occurred on May 9, 1976. The complaint alleges the plaintiffs' injuries were caused by defective chain which had been packaged and sold by Weissenfels to its North American distributor, Fehr Brothers, Inc., which had resold it in Arkansas. Plaintiffs are citizens of Arkansas. Fehr Brothers, Inc. is a New York Corporation. Acciaierie Weissenfels is a corporation engaged in chain manufacture organized and existing under the laws of Italy. The amount in controversy exceeds $10,000.00 and it is undisputed that Federal Diversity of Citizenship exists.

Following service of process upon Acciaierie Weissenfels by Plaintiffs under the provisions of *Ark. Stat.* § 27-2502 (c)(1)(d), this defendant filed a Motion to Dismiss on the contention that the Fourteenth Amendment prohibited the exercise of an *in personam* jurisdiction in Arkansas over the Italian corporation.

The District Court overruled Weissenfels' motion in a memorandum opinion entered August 22, 1977 (App. C). Thereafter, the trial court made the appropriate certification for an interlocutory appeal to the Eighth Circuit under the provisions of 28 *U.S.C.* 1292 (b) which agreed to hear the matter. On

March 22, 1978, a three judge panel affirmed the trial court's ruling by a divided vote (App. B). Thereafter, Weissenfels filed a Petition for Rehearing and a suggestion for an en banc hearing. This was granted by the appellate court which on August 18, 1978 by a vote of 4 to 3 reversed the trial court's decision on the grounds that the Due Process Clause prohibited subjecting Weissenfels to Arkansas' *in personam* jurisdiction.

Certiorari is sought from this final decision of the Eighth Circuit.

ARGUMENT

I

Petitioner Has Standing to Ask for Certiorari.

Petitioner, Fehr Brothers, Inc., clearly is adversely affected by the majority opinion of the Eighth Circuit. Petitioner's involvement in this cause arises solely from the fact that it distributed chain sold to it by Weissenfels under an exclusive distributorship agreement. The alleged acts of active negligence and breaches of warranty are attributed to Weissenfels. The gravamen of the complaint is that Weissenfels knowingly purchased low quality Yugoslavian chain and repackaged and sold it as high quality Italian chain manufactured by Weissenfels. Under such circumstances, Fehr Brothers, Inc., under Arkansas law, has causes of action over against Weissenfels both for indemnity and contribution. *See, e.g., Ark. Stat. Ann.* 34-1001, et seq.; *Dulin v. Circle F Industries, Inc.*, 558 F. 2d 456 (8th Cir. 1977.) In fact, subsequent to the trial court's overruling Weissenfels' motion to dismiss, Fehr has asserted cross-claims against Weissenfels, asking for indemnity and contribution. The decision of the Eighth Circuit holds Weissenfels is not subject to *in personam* jurisdiction in Arkansas, on account of the injuries received by Hutson and Epperson. It is clearly *res judicata* that Fehr may not assert any cross-claims against Weissenfels. There simply is no reason to require Fehr to return to the District Court, suffer a preordained dismissal of its cross-complaints, return to the Eighth Circuit for a likewise preordained affirmation, and then ask this Court for certiorari. This cause is ripe for determination by this Court and Petitioner is clearly adversely affected by a decision—the net effect of which is to require it to bear the financial brunt of any judgment which may be entered in the Arkansas action, and to likewise require it to relitigate the same lawsuit in a foreign jurisdiction

in order to enforce its rights of indemnity and contribution. Indeed, there is authority for the proposition that Fehr would be an aggrieved party and entitled to appeal even had it not asserted its right of contribution. *See, e.g., Emmons v. Agricultural Ins. Co.*, 245 La. 411, 158 So.2d 594; *See, also, Dertz v. Pasquina*, 15 Ill. App. 3, 470, 305 N.E.2d 54; *Eltin v. Ava Truck Leasing, Inc.*, 100 N.J. Super. 515, 242 A.2d 663, affirmed in part, reversed in part; 53 N.J. 463, 251 A.2d 278. As an unsuccessful appellee which participated in the proceedings at the Circuit Court level, Fehr Brothers, Inc. has standing to ask for certiorari from an order which has an immediate, direct and adverse effect on its position.

II

The Majority Opinion of the Eighth Circuit Is in Conflict With the Applicable Decisions of the Arkansas Supreme Court.

There simply can be no question that the opinion of the majority of the Eighth Circuit in the present case is in direct conflict with the construction given to Arkansas' Long-Arm Statute by the Supreme Court of that State. *See, Nix v. Dunavant*, 249 Ark. 641, 460 S.W.2d 762, 764-765 (1970); *International Harvester v. Hendrickson Manufacturing Company*, 249 Ark. 298, 459 S.W.2d 62, 64-65 (1970); *Pennsalt Chemical Corp. v. Crown Cork & Seal Co.*, 426 S.W.2d 417, 419-22 (1968). This factor was candidly admitted by Judge Bright when, in his original dissenting opinion prior to the granting of a Petition for Rehearing, he stated, at Page 7 of the opinion (App. B):

> "No doubt the Court's decision accords with the Arkansas Supreme Court's interpretation of the State's longarm statute."

Again, in Judge Bright's subsequent *en banc* opinion, he conceded (P. 5):

> "Accordingly, Arkansas state law permits in personam jurisdiction over Weissenfels in this case."

This factor was likewise noted by Circuit Judge Lay in his dissenting opinion from the Court's final judgment by his notation:

> "I wish to make an additional observation. If this accident were pending in the State Court, it is clear that under the Arkansas statute, *Ark. Stat. Ann.* § 27-2502(c)(1)(d) that the Supreme Court of Arkansas would uphold the service of process on defendant Weissenfels."

There simply can be no dispute in the case at bar that Weissenfels could reasonably anticipate that its chain product would be distributed in the State of Arkansas. Weissenfels and Fehr Brothers, Inc. had an exclusive distributorship agreement. Under the terms of this agreement, it was the right of Fehr Brothers, Inc. to distribute Weissenfels chain in every state in the United States. Indeed, Weissenfels would have had reason to complain had not Fehr actively advertised, sold and distributed Weissenfels chain in Arkansas. Perhaps the most startling aspect of the majority opinion in the case at bar is that the Court specifically found that Weissenfels was, for purposes of the jurisdictional question, guilty of a tortious act outside of Arkansas which caused injury inside the State. The Court further found that Weissenfels had, over a period of years, derived "substantial revenue" from the sale by Fehr in Arkansas of Weissenfels' products (these sales over a four-year period amounted to $74,000.00). However, having found that the two prerequisites of the Arkansas long-arm statute had been met, i.e., the tortious act outside the State, and derivation of substantial revenue from sales within the State, the majority found that the Fourteenth Amendment prohibited Arkansas from exercising jurisdiction over this defendant.

The majority opinion was premised upon the consideration that Weissenfels owned no property and directly did no busi-

ness in Arkansas. The Court in effect found that, even though Weissenfels could have reasonably foreseen the presence of its product in Arkansas, there was not a sufficient basis for the exercise of due process jurisdiction in this case. The Eighth Circuit's rejection of the foreseeable presence of a product as a sufficient basis for jurisdiction is contrary to all of the above-quoted Arkansas Supreme Court decisions. For example, in the *Hendrickson Manufacturing Company* case, *supra*, the Arkansas Supreme Court was confronted with a fact situation almost identical to the case at bar. In *Hendrickson*, jurisdiction was upheld against a foreign corporation under the long-arm statute despite the fact that the defective product had not been directly distributed into this state by the defendant. Moreover, this result was reached despite the fact that defendant (a) owned no property in Arkansas; (b) did not solicit business in Arkansas; (c) maintained no offices or agents in Arkansas; and (d) sold its product to a separate corporate entity which acquired title to it and later introduced it as part of a finished product into Arkansas. As noted by the Court:

> Today manufacturers rarely deal directly with consumers. Their products are often designed for sale in whatever markets may be found for them. Such nationwide markets make it likely that consumer injuries will occur in states far removed from the manufacturer's place of business. It has therefore been suggested that the use of such products in the ordinary course of commerce is sufficient contact with the forum wherein the injury occurred to justify its exertion of jurisdiction. *Gray v. American Radiator & Standard Sanitary Corp., supra. See also, Anderson v. National Presto Industries*, 257 Iowa 911, 135 N.W.2d 639 (1965).

The exercise of due process jurisdiction based upon foreseeable presence of the product has unquestionably been the overwhelming trend of decisions in all of the states with equitable long-arm statutes. This trend was succinctly summarized

by the United States District Courts in the case of *Reiley v. P. J. Wolff & Sohne*, 374 Fed. Supp. 775 (D.C. New Jersey 1974) in which a German manufacturer of a press brake was held subject to New Jersey's long arm statute. The Court quoted with approval various state court decisions and noted:

> The New Jersey Courts on similar factual grounds have held that foreign corporations can thus be served and sued in State courts there. *Cerlisimo v. Heidelberg*, 122 N.J. Super 1, 298 A.2d 298, affirmed sub. nom. *Van Esuwen v. Heidelberg Eastern, Inc.*, 124 N.J. Super. 251, 306 A. 2d 79 (Appellate Division 1973).
>
> There a German corporation, H.D.A.G., with absolutely no plant, personnel or property within the United States manufacturing a printing press. H.D.A.G., in turn, sold its press in Germany, to an American distributor which in turn resold it to a New Jersey corporation whereat it caused allegedly by its negligence in construction an injury to a plaintiff in New Jersey. Upon these facts, the New Jersey courts held H.D.A.G. could be served under New Jersey's long-arm statutes, because the defendant could anticipate that its presses would cause injury if negligently made, and intended its machines to be sold in the United States, although it had no knowledge that it would be resold in any particular state of these United States.

A few of the multitude of decisions of other states which have held that a manufacturer or distributor subjects himself to due process jurisdiction if he knowingly introduces his commerce into the stream of interstate commerce are *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761; *Metal-Matic, Inc. v. Eighth Judicial District*, 415 Pac.2d 617 (Nev. 1966); *Anderson v. National Presto Industries*, 257 Iowa 911, 135 N.E.2d 639 (1965); *Atkins v. Jones & Lofton Steel Company*, 258 Minn. 571, 104 N.W.2d 888 (1960).

Again, it was candidly noted by Judge Bright in his initial dissenting opinion (Page 8);

> The majority's view is also in harmony with the trend of recent state court and Federal circuit court interpretations of the constitution of due process requirements establisned by the United States Supreme Court.

Petitioners respectfully submit that this cause is an appropriate one for certiorari in view of the admitted fact that the Eighth Circuit has reached a result contrary not only to the results of the Arkansas Supreme Court, but also to those decisions of other states construing their long-arm statutes. The majority opinion frankly acknowledges that they are retreating from the doctrine announced in the above-captioned cases on the theory that the pendulum has "swung too far" in favor of upholding service. If such a dramatic and far-reaching result is indeed to be reached, Petitioners respectfully feel that it is a doctrine which should be announced by this Court, and not by a bare majority of a sharply divided Appellate Court.

Finally, it should be noted that the majority opinion is premised in part upon a clearly erroneous statement as to the relationship of Fehr and Weissenfels. Judge Bright found in the *en banc* opinion (p. 3) that Fehr repackaged the chain received from Weissenfels. All counsel agreed and the record clearly reflects Fehr sold the chain in the identical containers and packaging in which it had been received from Weissenfels.

III

The Majority Opinion Is in Direct Conflict With the Decisions of Other Circuits.

As noted above, it was candidly conceded by Judge Bright that the position of the majority in this case was in conflict with the trend of decisions in other Circuit Courts of Appeal. Not

only have the other circuits clearly adopted the foreseeable presence doctrine, but Petitioner has been unable to find a single case wherein jurisdiction was refused in a fact situation where the defendant not only received substantial revenue from sales within the forum state but likewise had actively advertised its products therein. There simply is no dispute as to this latter factor in the case at bar. Fehr Brothers, Inc. had, as authorized by its distributorship agreement, specifically and systematically advertised the quality and competitiveness of Weissenfels chain in Arkansas. A typical example of such advertisements by Fehr on behalf of Weissenfels is contained at Page 10 of the final dissenting opinion and states:

> Acciaierie Weissenfels has been producing chains for over five hundred years and is a pioneer in the technological development of chain. Our factory is equipped with the most chain welding and heat treating equipment available and staffed by highly skilled workmen to whom chain making is a family tradition.
>
> We welcome your inquiries for High Test and Special Alloy Steel Chains.

The majority opinion in the case at bar simply glossed over the fact of this advertising.

The following decisions of other Circuits are clearly in conflict with the opinion of the majority in the case at bar. *Eyerly Aircraft v. Killian*, 414 Fed. 2d 591 (5th Cir. 1969); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 Fed. 2d 231 (9th Cir. 1969); *Ajax Realty Corp. v. J. F. Zook, Inc.*, 493 Fed. 2d 817 (4th Cir. 1972) *cert. denied*, 411 U.S. 966, 36 LEd.2d 687, 93 S.Ct. 2148; *Honeywell, Inc. v. Metz Apparatewerke*, 509 F2d 1137 (7th Cir. 1975). All of these cases have specifically held that where a foreign manufacturer sells its goods to an independent distributor who later resells the product within the forum state, that the original manufacturer is subject to due proc-

ess jurisdiction, on the theory that he knew or should have reasonably foreseen that his product might be resold within the forum state. Former Justice Goldberg, in the *Eyerly Aircraft* case, *supra*, discussed in detail the evolution of the expansion of due process jurisdiction to reach this result:

> This result also obtains where the manufacturer has elected to distribute his wares to independent wholesalers instead of through its own corporate apparatus, so that it is only very indirectly responsible for the product reaching the injured customer. *Florio v. Power Tool Corp.*, 3 Cir. 1959, 248 Fed. 2d 367; *Etzler v. Dille & McGuire Manufacturing Co.*, W.D.Va., 1965, 249 F. Supp. The present trend is to take the next logical step and hold that a corporation is answerable where it introduces its product into the stream of interstate commerce if it had reason to know or expect that its product would be brought into the state where the injury occurred.
>
> . . . When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand, he cannot reasonably claim that he is surprised at being held to answer in any state for the damage the product causes. Nor can he deny the substantial interest of the injured person's state in providing a convenient forum for its citizen. *Keckler v. Brookwood Country Club*, N.D.Ill., 1965, 248 F Supp. 645, 648-649.

In the *Duple Motor Bodies* case, the Ninth Circuit specifically found that an English manufacturer of coach bodies was subject to the long-arm statute, wherein this product had reached Hawaii through an independent distributor. The Ninth Circuit did not share the concern of the majority of the Eighth Circuit that an international defendant was involved. The Court noted:

> Nor do we share Appellant's concern that we are in an area of international and not simply interstate commerce.

The lower Federal Courts reading the clear holdings of the above quoted cases, and the applicable decisions of the State Supreme Courts have repeatedly held international defendants subject to state long-arm jurisdiction where the product was introduced into the forum state by an independent distributor. *See, e.g. Blum v. Kawaguchi Ltd.*, 331 F. Supp. 216 (W.D. Neb. 1971); *Hetrick v. American Honda Motor, Inc.*, 429 F. Supp. 116 (D.C. Neb. 1976); *Reiley v. P. J. Wolff & Sohne. supra.* The majority opinion of the Eighth Circuit in effect holds that these lower Courts have acted unconstitutionally on the facts in their case, and likewise that its sister Circuits have incorrectly applied the due process clause of the United States Constitution. Surely, such a sweeping pronouncement by such a sharply divided Court presents a proper case for certiorari.

IV

The Majority Opinion Has the Effect of Declaring Arkansas Stat. Ann. § 27-2502(c)(1)(d) Unconstitutional.

As noted above, the relevant portion of the Arkansas Long-Arm Statute provides without exception that a foreign defendant is subject to jurisdiction within Arkansas providing that this defendant receives substantial revenue from Arkansas sales, and commits a tortious act outside of the state resulting in injury in Arkansas. The most startling factor of the majority opinion is that the Court specifically found that both of the above prerequisites had been met. There simply is no question that the actions of Weissenfels in mislabeling substandard Yugoslavian chain, and reselling it as its own high quality Italian chain at an inflated price is a tortious act. None of the Justices disagreed with the proposition that Weissenfels systematically received substantial revenue from Arkansas sales. The fact of advertisement and solicitation by Fehr on behalf of Weissenfels as authorized and to the latter's direct benefit is undisputed.

The effect of the majority opinion was succinctly recognized in Judge Lay's dissenting opinion at Page A-14, wherein he noted:

> The majority's decision in effect declares unconstitutional that portion of the Arkansas Statute which provides for service of process on a defendant that reached financial gain from the distribution of his product in the state. This decision should create great concern to the vast majority of states that have sought to expand their long-arm statutes to protect their citizens from defective products manufactured and distributed in their states by foreign corporations.

It is certainly arguable that Petitioner would have a right of direct appeal to this Court from the majority opinion as a state statute was in effect held unconstitutional. However, since the majority opinion in effect reached this result, but refused to express it in those terms, Petitioners have instead asked for the remedy of certiorari.

The majority's opinion was based upon what is respectfully submitted was an erroneous interpretation of the decisions of this Court in *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958), and *International Shoe Company v. State of Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154. It is submitted by Petitioner that the purposeful receiving of revenue from a forum state, combined with a tortious act outside of the state, constitutes a sufficient "minimum contact" and likewise a purposeful availment of conducting activities within the forum state to satisfy the requirements of the due process clause, and is clearly not violative of the decisions reached in either of the aforementioned cases.

In any event, the fact that the majority opinion in effect declares a state statute unconstitutional under the circumstances

of the case, is, in itself, a sufficient ground for the granting of certiorari, apart from the other factors previously relied upon in Petitioner's brief.

CONCLUSION

Rule 19 of this Court states that in deciding whether a Writ of Certiorari is proper, the following are some of the factors which will be taken into consideration:

> Where a Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of Federal law which has not been, but should be, settled by this Court . . ."

It is respectfully submitted by Petitioners that the majority opinion of the Eighth Circuit Court of Appeals meets all of the above criteria. Likewise, although not expressly so stating, it is clear that the majority decision in effect holds a state statute unconstitutional. Under these circumstances, it is respectfully submitted by Petitioner that this is a proper case for certiorari. This is especially so in an era where the presence of goods manufactured in foreign countries, in the stream of interstate commerce, is becoming an everyday fact of life. If such foreign manufacturers are to be allowed, unlike American manufacturers, to in effect insulate themselves from products liability through the simple device of using an independent distributor, and if the citizens of the states are to be denied an effective remedy against such foreign entities, such a proposition should be clearly enunciated by this Court on a question of such important and far-reaching consequences.

The Eighth Circuit has unanimously recognized that a substantial constitutional question is involved by staying all proceedings at the District Court level pending Fehr's petition for certiorari since under its local rules such stays are granted only where good cause exists and a "substantial question is to be presented to the Supreme Court" (Rule 18).

Finally, it should be noted that of the nine separate judges who have been involved in this cause, five (including the trial court and U.S. District Judge Albert Shatz who sat by designation on the original three judge panel) have disagreed with the contentions of Weissenfels.

Petitioners, therefore, respectfully pray for the issuance of a Writ of Certiorari to the Eighth Circuit Court of Appeals.

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APPENDIX

APPENDIX A

En Banc Opinion of Circuit Court

United States Court of Appeals
for the Eighth Circuit

No. 77-1818

Woodrow Hutson,
Appellee,

v.

Fehr Brothers, Inc.,
Appellee.

Acciaierie Weissenfels,
Appellant.

* * *

John David Epperson,
Appellee,

v.

Fehr Brothers, Inc.,
Appellee,

Acciaierie Weissenfels,
Appellant.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: June 12, 1978

Filed: August 18, 1978

Before GIBSON, Chief Judge; LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, and HENLEY, Circuit Judges, *En Banc*.

BRIGHT, Circuit Judge.

This permissive interlocutory appeal stems from the attempted exercise of *in personam* jurisdiction over a foreign corporation, by substituted service, under the Arkansas long-arm statute. Ark. Stat. Ann. § 27-2502(C)(1)(d) (Supp. 1975). The United States District Court for the Western District of Arkansas denied defendant-appellant Acciaierie Weissenfels' motion to dismiss two suits seeking damages for alleged bodily injuries for lack of *in personam* jurisdiction. The court then made the appropriate 28 U.S.C. § 1292(b) certification upon motion of Weissenfels and we permitted the appeal to be taken. We reverse the district court.

I

Plaintiffs Woodrow Hutson and John David Epperson, residents of Arkansas, filed separate related product liability actions seeking damages for injuries allegedly sustained on May 9, 1976. Named as defendants in these actions were Weissenfels, an Italian corporation with its principal place of business in Fusine, Valromana, Italy, and Fehr Brothers, Inc., a New York corporation with its principal place of business in New York City, New York.

In their complaints, plaintiffs contend that they were injured while working at the Murfreesboro Lumber Company in Murfreesboro, Arkansas, when a three-eighths inch chain broke. Murfreesboro Lumber Company purchased the chain from the Carroll Building and Apliance Company in Murfreesboro, Arkansas. The open barrel from which the chain was purchased allegedly bore the label FAIRLINE, the trademark used by defendant Fehr Brothers, Inc. It was also stamped "Yugoslavia."

Plaintiffs allege a complicated series of transactions linking Weissenfels to the chain in question. They claim that the chain was manufactured in Yugoslavia by some unknown manufac-

turer. Weissenfels purchased the chain and then packaged and sold it as its own product to Frank Fehr & Co., a British corporation with the exclusive right to sell Weissenfels' products in North America. Frank Fehr & Co. resold the chain to its American subsidiary, Fehr Brothers, Inc. Fehr Brothers then repackaged the chain under its own brand name, FAIRLINE, and resold it. Ultimately, the chain reached the retailer, Carroll Building and Appliance Company, who sold the chain to the plaintiffs' employer, Murfreesboro Lumber Company. The plaintiffs also alleged in their complaints that between October 1, 1972, and September 30, 1976, Fehr Brothers, Inc., sold Weissenfels chains in Arkansas for a total revenue of more than $74,000.

In its reply, Weissenfels denies that it purchased or packaged this particular chain as its own product. Because this case is before us on appeal from a motion to dismiss for lack of personal jurisdiction, however, we must assume that the facts supporting jurisdiction in plaintiffs' complaints are true. This permits us to accept as true plaintiffs' allegation that Weissenfels was one link in the series of commercial transactions that brought the chain to Arkansas.

II

This appeal presents the following two issues: whether the Arkansas long-arm statute authorizes the exercise of jurisdiction over Weissenfels and, if so, whether the district court's exercise of *in personam* jurisdiction over Weissenfels would violate the due process clause of the fourteenth amendment.

A

The relevant provision of the Arkansas long-arm statute, Ark. Stat. Ann. § 27-2502(C)(1)(d), states:

1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's

* * *

(d) causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State[.]

The statute establishes two requirements pertinent to this case: (1) that Weissenfels' acts or omissions outside of the state caused the tortious injury in Arkansas; (2) that Weissenfels derived "substantial revenue" from the sale of its chains in Arkansas.

The first of these requirements presents no great difficulty for, as we have already noted, we must accept as true the allegations in plaintiffs' complaints that the chain was repackaged and resold by Weissenfels. Under a products liability theory, the seller as well as manufacturer may be liable for injuries caused by defective products.

The revenue issue is more troublesome, however, because plaintiffs pleaded no facts indicating how much revenue is derived by Weissenfels from Arkansas sales. Instead, plaintiffs merely alleged that Fehr Brothers, the American subsidiary of Frank Fehr & Co., the British company, derived $74,551.35 in revenue from Arkansas sales over a four-year period. Because Weissenfels is at least two steps removed from Fehr Brothers in the distribution chain, it is safe to assume that the $74,551.35 figure is diminished. Under applicable Arkansas case law, however, the revenue requirement is met. For example, the Arkansas Supreme Court in *Pennsalt Chemical Corp. v. Crown Cork & Seal Co.*, 244 Ark. 638, 426 S.W.2d 417,

419 (Ark. 1968), held sales over a three-year period ranging from a high of $1,987.78 to a low of $123.60 to be "substantial revenue" under this statute.

Accordingly, Arkansas state law permits *in personam* jurisdiction over Weissenfels in this case.

B

We must still determine whether the exercise of *in personam* jurisdiction over this foreign corporation would violate its right to due process under the fourteenth amendment.

In order to satisfy due process in cases in which service of process is accomplished by means of a long-arm statute, the foreign corporation must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In addition, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State * * *." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

The Supreme Court last term in *Shaffer v. Heitner*, 433 U.S. 186 (1977), discussed the applicable due process test for the exercise of personal jurisdiction over a foreign corporation:

> Thus, the inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was "present" but on whether there have been
>
> > "such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." * * *

Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." • • •
>
> Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction. [*Shaffer v. Heitner*, 433 U.S. 186, 203-04 (1977), *quoting International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (footnote omitted).]

The courts interpreting the *International Shoe* "minimum contacts"—fairness doctrine on occasion have tended to expand jurisdiction so as to include any corporation that

> introduces its product into the stream of interstate commerce if it had reason to know or expect that its product would be brought into the state where the injury occurred • • •. [*Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 596 (5th Cir. 1969).]

Indeed, the court in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (Ill. 1961), noted that jurisdiction is presumed unless the *defendant* can prove that the presence of the product in the forum state was an unforeseeable event. Nonetheless, the requirement of minimum contacts mandates some degree of concern for the interest of the nonresident defendant.

In this case, we cannot agree with the district court's conclusion that exercise of *in personam* jurisdiction over Weissenfels is consistent with constitutional due process requirements established by the Supreme Court in *International Shoe* and reiterated in *Shaffer*. The determination, for example, of whether the "minimum contacts" test of *International Shoe* is met is not an easy task. Indeed, as the Supreme Court recently emphasized:

> [A]n essential criterion in all cases is whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in that State. *International Shoe Co. v. Washington*, [326 U.S. 310, 316-17, 319 (1945).] • • •
>
> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. *Hanson v. Denckla*, 357 U.S. 235, 246 (1958). [*Kulko v. Superior Court of California*, 98 S.Ct. 1690, 1697 (1978).]

In this case we are compelled to reach the conclusion that the requisite "affiliating circumstances" are not present. The connection between Arkansas and Weissenfels is an attenuated one.

Weissenfels' contacts with Arkansas consist only of the fortuitous introduction of Weissenfels products into the forum state through the decision of Frank Fehr & Co., a British company. Weissenfels neither manufactured the defective chain nor sold or marketed it in the United States. Weissenfels' only apparent connection with the chain was that at one time it repacked and resold it to Frank Fehr & Co. These are insufficient "minimal contacts" with the forum state for Arkansas to exercise juris-

diction over Weissenfels. Weissenfels did not consciously solicit or purposely avail itself of the privilege to conduct business in the forum state, as *Hanson* requires for the exercise of jurisdiction. 357 U.S. at 253. The Fehr Co. exercises control over the selection of the customers and other marketing decisions relating to the sales of the Weissenfels products which it purchases. We recognize that the State of Arkansas has a strong interest in providing a forum for its residents who are injured by defective products of foreign corporations[1] and that Weissenfels did repackage and resell the chain to Frank Fehr & Co. Nevertheless, *in personam* jurisdiction simply cannot rest on such a frail foundation.

Furthermore, we realize that the question of jurisdiction, which is relatively more concerned with fairness, is distinct from that of venue, which is more concerned with convenience. "Nevertheless, whatever will support the plea [of forum non conveniens] will excuse the corporation from defending the suit * * *," and can be considered in determining whether jurisdiction should be exercised. *Latimer v. S/A Industries Reunidas F. Matarazzo*, 175 F.2d 184, 186 (2d Cir. 1949), *cert. denied*, 338 U.S. 867 (1949).

Various considerations usually associated with forum convenience are pertinent to whether Weissenfels should be subject to jurisdiction in Arkansas. Weissenfels is burdened substantially by having to defend this lawsuit. It must hire United States counsel and support personnel and presumably transport its witnesses to Arkansas from Italy in the event of trial. Naturally, it will be strongly tempted to settle, even if it believes it is not liable, because of the tremendous expense of trying the lawsuit, an expense that bears far more heavily on it than on the other parties.

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[1] We further note that plaintiffs in this action do not suffer from a dearth of available defendants. Arkansas has exercised jurisdiction over the packager and distributor, Fehr, and can exercise jurisdiction over the retailer, Carroll Building and Appliance Company.

We, therefore, conclude that Arkansas' exercise of jurisdiction over Weissenfels would offend the "traditional notions of fair play and substantial justice" standard established in *International Shoe*.

We reverse and remand, directing that Weissenfels be dismissed as a defendant.

STEPHENSON, Circuit Judge, with whom LAY and HEANEY, Circuit Judges, join, dissenting

The dispositive issue in this case is whether Acciaierie Weissenfels (AW) is insulated from in personam jurisdiction under the due process clause of the Fourteenth Amendment in a product liability case because it used an intermediary in the sale and distribution of an alleged faulty chain causing plaintiffs' injuries. AW purchased the chain in question from an unknown Yugoslavian firm and then packaged and sold it as its own product[1] to Frank Fehr & Co., a British corporation with the exclusive right to sell AW's products in North America.

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[1] It was so alleged by plaintiffs and assumed to be true under the motion to dismiss. *See* majority opinion, *supra*, slip op. at 3. We also note that Fehr Brothers, Inc. in response to an interrogatory admitted that periodically since 1972 it had distributed to Arkansas customers advertising brochures showing AW products. A sample first page thereof is attached to its brief and reads as follows:

> ACCIAIERIE WEISSENFELS has been producing chains for over 500 years and is a pioneer in the technological development of chain. Our factory is equipped with the most modern chain welding and heat treating equipment available and staffed by highly skilled workmen to whom chain making is a family tradition.
>
> We welcome your inquiries for High Test and Special Alloy Steel Chains.
>
> Exclusive Agents for U.S.A.
>
> FEHR BROS. MANUFACTURERS, Inc. 110, Wall Street
> NEW YORK, N. Y.—10005
> FAIRLINE [trademark]

Frank Fehr & Co. resold the chain to is American subsidiary, Fehr Brothers, Inc.

The district court in its memorandum opinion denying AW's motion to dismiss noted that AW relied on language in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), which was cited with approval in *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977), to the effect that a defendant must have "purposely avail[ed] itself of the privilage of conducting activities within the forum State" to subject itself to personal jurisdiction. The district court then stated:

> We hold that on the alleged facts of this case, the phrase "purposefully avails itself of the privilege of conducting activities" includes the actions of AW. We reach this result because AW's product which it allegedly packaged and warranted as its own is the subject matter of this litigation. In delivering the chain to Frank Fehr and Company, AW must have anticipated that the chain would be distributed in all fifty states of the United States and it must have foreseen that its product would be sold within Arkansas.
>
> AW was not the entity which consummated the sale within Arkansas. If this fact were decisive and if a foreseeability test for "purposely avails itself" were not applied in products liability cases, an injured person would almost always be left with no direct recourse against the manufacturer of the product causing his injury.

The courts have recognized that direct contact with the forum state is not essential to the exercise of personal jurisdiction. So long as a manufacturer or distributor can reasonably anticipate that its products will be sold and distributed in a given state and through their use injury occur, it can be held to account through in personam jurisdiction. In *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1144 (7th Cir. 1975), the court of appeals made it abundantly clear that a court must look to the economic realities of the case.

> To the extent that a corporate defendant avails itself of the privilege of conducting activities in a state, it enjoys the benefits and protection of the laws of that state, *International Shoe, supra*, 326 U.S. at 319, 66 S.Ct. 154, and we believe that Metz has done so by injecting its products into the Illinois marketplace. Metz urges that its activity does not fit this mold simply because its products are sold to EPOI "f.o.b. German seaport or German border," Appellee's Brief at 11, but that position is not, of course, a realistic evaluation of the nature and quality of Metz's business affairs, viewed in light of the arrangement with EPOI.
>
> Direct contact with the forum state is not essential to the exercise of personal jurisdiction. Metz may not have physically entered the state of Illinois, but it placed its flash devices in the stream of commerce under such circumstances that it should reasonably have anticipated that injury through infringement would occur there. [Citations omitted.] We look to the economic and commercial realities of this case, and in our view, it is not within the contemplation of the concepts of fairness and due process to allow a wrongdoing manufacturer to insulate himself from the long arm of the courts by using an intermediary or by professing ignorance of the ultimate destination of his products.

It would be fundamentally unfair to allow a foreign manufacturer to insulate itself from the jurisdiction of the court through the use of an exclusive distributor. *Hetrick v. American Honda Motor Co.*, 429 F. Supp. 116, 118-19 (D. Neb. 1976).

It is not essential to personal jurisdiction that AW knew that its product was being sold in Arkansas. It is enough that AW could reasonably anticipate that its product sold through an ex-

clusive distributorship in North America might ultimately be used in any state of the United States and it would be held to answer in any such state for the damage the product caused. The manufacturer cannot deny the substantial interest of the injured person's state in providing a convenient forum for its citizens.

A corporation is answerable where it introduces its product into the stream of interstate commerce if it has reason to know or expect that its product would be brought into the state where the injury occurred. *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 595-96 (5th Cir. 1969). *Accord, Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1350 (5th Cir. 1970); *William v. Vick Chemical Co.*, 279 F. Supp. 833, 837 (S.D. Iowa 1967). Where the activities complained of create a substantial risk of injury in the forum state, direct contact with that state is not essential. *Jones Enterprises, Inc. v. Atlas Service Corp.*, 442 F.2d 1136, 1140 (9th Cir. 1971); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 235 (9th Cir. 1969).

The Supreme Court recognized that a single transaction is a sufficient contact for purposes of due process if it gives rise to the liability asserted in the suit. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). The Court noted the trend "toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents" is in part attributable to the transformation of our national economy over the years. *Id.* at 222.

> Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 222-23. *Compare Kulko v. Superior Court of California*, 98 S.Ct. 1690, 1699, 1701-02 (1978), where the Supreme Court noted that the transaction giving rise to the claim for personal jurisdiction was not a commercial transaction involving an economic benefit to the party that would make fair the assertion of the state's judicial jurisdiction.

A state has a legitimate interest in providing a meaningful forum for its citizens who have suffered damages as a result of faulty products being shipped into the state by foreign corporations. In *Hardy v. Pioneer Parachute Co.*, 531 F.2d 193, 195 (4th Cir. 1976), the court stated:

> Modern transportation, communication, and the national flow of commerce have contributed to the recognition that states have a legitimate interest in providing means for their citizens to seek redress against foreign corporations that ship allegedly defective products into the state. No unconstitutional burden is imposed on a foreign corporation by requiring it to defend a suit in a forum located in a state where it has advertised and sold a product whose use gave rise to the cause of action.

We recognize that the inconvenience resulting to a foreign defendant in defending itself should not be ignored but where the defendant benefits from economic activity within the forum state and the cause of action arises out of such activity it is not unfair to hold the defendant accountable in the courts of the forum. *Honeywell, Inc. v. Metz Apparatewerke, supra*, 509 F. 2d at 1145; *Hetrick v. American Honda Motor Co., supra*, 429 F. Supp. at 119.

In summary, we are satisfied that AW has purposefully availed itself of the privilege of conducting activities within the forum state as required by *Hanson v. Denckla, supra*, 357 U.S. at 253. It is enough, as demonstrated by the record, that AW had reason

to know that its products, traveling through an exclusive distributorship, could be sold in any state of the United States. Under the circumstances, we do not believe it is unreasonable to require Acciaierie Weissenfels to defend this product liability action in Arkansas. It is fundamentally unfair to allow a foreign manufacturer to insulate itself from the jurisdiction of the courts by use of an exclusive distributorship.

LAY, Circuit Judge, dissenting, in which HEANEY, Circuit Judge, joins.

I fully concur in Judge Stephenson's well-reasoned dissenting opinion. I wish to make an additional observation. If this action were pending in the state court it is clear under the Arkansas statute, Ark. Stat. Ann. § 27-2502(C)(1)(d)[1] that the Supreme Court of Arkansas would uphold the service of process on defendant Weissenfels. *See Nix v. Dunavant*, 249 Ark. 641, 460 S.W.2d 762, 764-65 (1970); *International Harvester Co. v. Hendrickson Mfg. Co.*, 249 Ark. 298, 459 S.W.2d 62, 64-65 (1970); *Pennsalt Chemical Corp. v. Crown Cork & Seal Co.*, 244 Ark. 638, 426 S.W.2d 417, 419-22 (1968). The majority's decision in effect declares unconstitutional that portion of the Arkansas statute which provides for service of process on a defendant that reaps financial gain from the distribution of its product in the state. This decision should create great concern to the vast majority of states that have sought to expand their long arm statutes to protect their citizens from defective products manufactured and distributed in their states by foreign corporations.

For many years state legislation restricted service of process to persons who were actively doing business in the state or who

[1] Arkansas long arm statute is identical to the Uniform Interstate & International Procedure Act § 1.03.

were otherwise physically present in the state. *See Developments in the Law—State-Court Jurisdiction*, 73 Harv. L.Rev. 909, 917 (1960). As the nation's industrialization rapidly expanded the practical realization grew that injured citizens were denied a convenient judicial forum to redress the tortious effect of foreign products shipped into the state. Following the decisions in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny, states began to amend their long arm statutes to expand their in personam jurisdiction over foreign corporations. These statutes were upheld as long as the exercise of jurisdiction did not offend traditional notions of fair play and substantial justice. Manufacturers were no longer allowed to disassociate themselves from their defective products shipped to distant points. *See generally*, Note, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 Mich. L.Rev. 1028 (1965). Long arm statutes providing jurisdiction over a foreign corporation who committed a single tortious act have long withstood constitutional challenge.[2] I am aware of no other federal or state decision which is in accord with the restrictive holding set out today.

It is somewhat surprising at this late date a federal court questions the efficacy of such legislation. Our holding today unduly encroaches upon a state's prerogative to provide its citizens a convenient avenue of recourse against a foreign tortfeasor. The majority circumvents this argument by saying that

[2] *See e.g., Sells v. International Harvester Co.*, 513 F.2d 762, 763 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Dawkins v. White Products Corp.*, 443 F.2d 589, 590-94 (5th Cir. 1971); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761, 762-66 (1961); *Andersen v. National Presto Industries, Inc.*, 257 Iowa 911, 135 N.W.2d 639, 640-43 (1965); *Ehlers v. United States Heating & Cooling Mfg. Corp.*, 267 Minn. 56, 124 N.W.2d 824, 826-27 (1963). *Cf. Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965) (upheld service on foreign corporation stating that more than sufficient minimum contacts were present when injury resulted from defective product shipped directly into state).

plaintiffs "do not suffer from a dearth of available defendants." This offhand dismissal overlooks the sound judicial policy of encouraging the settlement of all claims arising out of the same core of operative facts in a single lawsuit.

The majority decision is a giant leap backward in the law.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

Original Opinion of Circuit Court

United States Court of Appeals
for the Eighth Circuit

No. 77-1818

Woodrew Hutson, John David Epperson, Fehr Brothers, Inc., Appellees,

v.

Acciaierie Weissenfels, Appellant.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: December 16, 1977

Filed: March 22, 1978

Before BRIGHT and STEPHENSON, Circuit Judges, and SCHATZ,* District Judge.

STEPHENSON, Circuit Judge.

This permissive interlocutory appeal stems from the attempted exercise of in personam jurisdiction over a foreign corporation, by substituted service, under the Arkansas long-arm statute.

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* The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, sitting by designation.

Ark. Stat. Annot. § 27-2502(C)(1)(d) (Supp. 1975). The district court[1] denied defendant Acciaierie Weissenfels' (Weissenfels) motion to dismiss for lack of in personam jurisdiction two complaints filed in the United States District Court for the Western District of Arkansas, Texarkana Division. The court made the appropriate section 1292(b) certification upon motion of Weissenfels. We affirm.

Plaintiffs Woodrew Hutson and John David Epperson, residents of Arkansas, filed separate related product liability actions seeking damages for injuries allegedly sustained on May 9, 1976, when a chain broke at the Murfreesboro Lumber Company in Murfreesboro, Arkansas. Named as defendants in these actions were Weissenfels, an Italian corporation with its principal place of business in Fusine, Valromana, Italy, and Fehr Brothers, Inc., a New York corporation with its principal place of business in New York City, New York. Weissenfels is a manufacturer of various types of industrial and commercial chain. At all times relevant to this action Weissenfels had a sales agreement with Frank Fehr and Co., Ltd., a British corporation, granting it the exclusive right to sell products manufactured by Weissenfels in certain specified areas, including North America.

The British corporation sold Weissenfels chain throughout the United States by means of its American subsidiary, Fehr Brothers, Inc. The chain was marketed by Fehr under its own brand name, FAIRLINE. Between October 1, 1972, and September 30, 1976, Fehr Brothers, Inc. sold Weissenfels chains in Arkansas for a total of almost $75,000.

Murfreesboro Lumber Company purchased the particular chain in question from the Carroll Building and Appliance Company in Murfreesboro, Arkansas. The open barrel from which the chain was purchased bore the label FAIRLINE, the trade-

[1] The Honorable Paul X Williams, United States District Judge for the Western District of Arkansas.

mark used by defendant Fehr Brothers, Inc. The chain was stamped "Yugoslavia."

In their briefs plaintiffs contend that the chain involved in this litigation was manufactured by a Yugoslavian manufacturer and packaged and sold by Weissenfels as its product. Defendant denies that it purchased or packaged this particular chain as its own product.

The following two issues are presented in this appeal: does the Arkansas long-arm statute authorize the exercise of jurisdiction over Weissenfels, and, if so, would the district court's exercise of in personam jurisdiction over Weissenfels violate due process?

The relevant provision of the Arkansas long-arm staute, Ark. Stat. Annot. § 27-*2502*(C)(1)(d), states:

> 1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's
>
> * * *
>
> (d) causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State;

Plaintiffs allege Weissenfels' acts or omissions outside the state caused tortious injury to them in Arkansas. Plaintiffs further contend that Weissenfels derived substanial revenue from the sale of its chain in Arkansas and therefore falls within the statute. Defendant Weissenfels contends that there was no evidence concerning the amount of revenue derived by Weissenfels from its goods consumed in Arkansas. There was evidence, how-

ever, that Fehr's sales of Weissenfels' products to Arkansas customers over a four-year period totaled $74,551.35. After a review of the Arkansas Supreme Court's interpretation of this statute we are convinced that the district court properly inferred from the evidence that Weissenfels derived "substantial revenues" under the meaning of the statute. For example, the Arkansas Supreme Court in *Pennsalt Chemical Corp. v. Crown Cork & Seal Co.*, 426 S.W.2d 417, 419 (Ark. 1968), held sales over a three-year period ranging from a high of $1,987.78 to a low of $123.60 to be "substantial revenue" under this statute.

Even though defendant is amenable to service of process under the Arkansas long-arm statute, we must still determine whether the exercise of in personam jurisdiction over this foreign corporation would violate its right to due process under the Fourteenth Amendment.

In order to satisfy due process where service of process is accomplished by means of a long-arm statute, the foreign corporation must "have certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). In addition, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State * * *." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In determining whether there are sufficient minimum contacts to satisfy the due process requirement in exercising in personam jurisdiction over a nonresident defendant, the following factors are operative: (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties.

Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 368 (8th Cir. 1969); *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965).

Admittedly the quantity of Weissenfels' contacts with the forum state are few. These contacts consist of Weissenfels' purposeful introduction of its product into the state of Arkansas through an exclusive distributorship agreement with Fehr and the revenue it thereby received. Furthermore, this revenue was substantial in nature and was produced, not from a one-time sale, but from the continuous and systematic sale of Weissenfels chain into the forum state over a four-year period.

The third factor we consider is the relation of the cause of action to these contacts. If the cause of action arises from the defendant's contacts with the forum state it is more reasonable to allow the exercise of in personam jurisdiction over the defendant. Here the plaintiffs' personal injuries, as alleged in the pleadings, arose from the very product which Weissenfels introduced into the forum state through Fehr, its exclusive distributor for the United States. We consider this factor to be significant. *See Aftanase v. Economy Baler Co., supra*, 343 F.2d at 196 n.2. As has been previously stated, Weissenfels' products consist of industrial and commercial chain. Due to the various uses to which industrial chain is put, it is quite foreseeable that an injury could occur if the chain was defectively manufactured and consequently broke.

The last two factors also weigh in favor of finding sufficient minimum contacts with the forum state. It cannot be denied that the state of Arkansas has a great interest in providing a forum for its residents who are injured by defective products of foreign corporations. In addition the evidence of the facts surrounding the accident is in Arkansas. The medical evidence of the plaintiffs' damages is in Arkansas. And finally, the injured plaintiffs are in Arkansas. This we compare to the rela-

tively small inconvenience to an international corporation in defending this suit in Arkansas. *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). Accordingly, we find that there are sufficient minimum contacts to satisfy the due process requirements as set out in *International Shoe Co. v. State of Washington, supra.* However, this does not end our inquiry.

Weissenfels strongly argues that it has not purposefully availed itself of the privilege of conducting activities within the forum state as required by *Hanson v. Denckla, supra,* 357 U.S. at 253. Specifically, Weissenfels contends that since Fehr exercised control over the selection of the customers for Weissenfels' products, there is no basis for finding "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, supra,* 357 U.S. at 253.

We believe it is not determinative whether Weissenfels knew that its product was being sold in Arkansas. To satisfy the requirement set out in *Hanson v. Denckla, supra,* it is enough that the defendant had reason to know that its products, traveling through an exclusive distributorship, could be sold in any state of the United States. *Eyerly Aircraft Co. v. Killian,* 414 F.2d 591, 595-96 (5th Cir. 1969); *Hetrick v. American Honda Motor Co.*, 429 F. Supp. 116, 118 (D. Neb. 1976); *Williams v. Vick Chemical Co.*, 279 F. Supp. 833, 837 (S.D. Iowa, 1967). *But see Velandra v. Regie Nationale Des Usines Renault,* 336 F.2d 292 (6th Cir. 1964). Weissenfels knowingly placed its products into the stream of commerce giving Fehr the exclusive right to distribute its products in any state in the United States. To allow Weissenfels to thereby insulate itself from a product liability action in a state where it derived substantial revenue from the sale of its products would be unreasonable. Under the circumstances, we do not believe it is unreasonable to require Weissenfels to defend this product liability action in Arkansas. The requirements of due process are satisfied and, accordingly, we affirm.[2]

Affirmed.

BRIGHT, Circuit Judge, dissenting.

I dissent. No doubt the court's decision accords with the Arkansas Supreme Court's interpretation of the state's long-arm statute.[3] *See, e.g., Pennsalt Chemical Corp. v. Crown Cork & Seal Co.*, 244 Ark. 638, 426 S.W.2d 417 (1968) (*in personam* jurisdiction exists over out-of-state manufacturer who, although carrying on no business activities in Arkansas, sold product to independent brokers who derived revenues of $1,987 in 1960, $540 in 1961, and $123 during part of 1962). The majority's view is also in harmony with the trend of recent state court and

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[2] The briefs indicate some dispute as to Weissenfels' relationship to the product in question. The record is not sufficiently clear for us to consider any claim in this regard. If there is a bona fide dispute the district court can give the matter further consideration. *See Block Industries v. DHJ Industries, Inc.*, 495 F.2d 256 (8th Cir. 1974).

[3] Arkansas Stat. Ann. § 27-2502.C.1(d) (Supp. 1973) provides that:

> 1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's * * *
>
> (d) causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State * * *.

The statute sets out two requirements that must be fulfilled before personal jurisdiction is appropriate: (1) the defendant must have caused the tortious injury within Arkansas; (2) the defendant must either do or solicit business in the state or derive substantial revenue from business activity within the state. Weissenfels contests both of these elements, claiming (1) that it did not manufacture, package under its own name, or have any connection with the chain that caused the injury; (2) the fact that codefendant Fehr Brothers de-

federal circuit court interpretations of constitutional due process requirements established by the United States Supreme Court.[4] Nevertheless, in my view, the decision abrogates the requirement of fundamental fairness contained within the due process clause and contravenes the Supreme Court mandate that personal jurisdiction over an out-of-state defendant may be acquired only if the defendant has such "minimum contacts" with the state so that maintenance of the suit will not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

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rived also $75,000 in revenue from sales of Weissenfels' chains in Arkansas in no way demonstrates that Weissenfels derived substantial revenue from Arkansas sales. Both the district court and the majority gloss over or ignore these objections. Since this case is before us on a motion to dismiss for lack of personal jurisdiction, however, we must assume that the facts supporting jurisdiction in plaintiffs' complaints are true. This permits us to accept as true plaintiffs' allegations that the chain was made by Weissenfels. The revenue issue is more difficult, however, because plaintiff pleaded no facts indicating how much revenue Weissenfels derived from Arkansas sales. The majority believes that it is proper to "infer" from the fact that Fehr received $74,511.35 in revenue from Arkansas over a four-year period that Weissenfels derived "substantial revenue" within the meaning of the statute. Although I am somewhat uncomfortable with the practice of "inferring" a necessary jurisdictional fact I do recognize that because this case is before the court on a motion for dismissal for lack of personal jurisdiction, the court may liberally infer the existence of jurisdictional facts in order to avoid a dismissal.

[4] *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), initiated this trend. The case is concisely summarized and analyzed in *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966):

> In Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 the defendant challenging jurisdiction had manufactured a safety valve which it sold outside the jurisdiction to a radiator manufacturer. The radiator was in the state when it exploded injuring the plaintiff. The statute provided for jurisdiction over a nonresident defendant who committed a tortious act within the state. The court, analogizing to traditional conflict-of-law principles, reasoned that a tortious act is not committed until the injury occurs. Since the injury occurred in the state, the statute was satisfied

The link between Weissenfels and the chain that allegedly caused the injury is attenuated at best. The chain apparently was manufactured in Yugoslavia by some unknown manufacturer, and then, according to plaintiff,[5] was repackaged and sold as its own product by Weissenfels, an Italian corporation. Weissenfels does no direct business in the United States, but sells chains to Frank Fehr & Co., a British corporation, which in turn distributes the chain in North America through its American subsidiary, Fehr Brothers. Fehr repackages and sells the chain

---

> and the defendant was subject to jurisdiction over his person. The court held that a single tortious act within the forum meets the "minimum contacts" requirement of International Shoe and satisfied traditional notions of fair play. The court next raised the issue of foreseeability in somewhat ambiguous terms. It first stated that the record failed to disclose whether the defendant did any business in the forum. Then the court said "it is a reasonable inference that (defendant's) commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State" and that the safety valves were "presumably sold in contemplation of use here". 176 N.E.2d at 766. The court said that, "[a]s a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products." 176 N.E.2d at 766. Finally, the court said "defendant does not claim that the present use of its product in the forum is an isolated instance." 176 N.E.2d at 766. Essentially, the court held that a nonresident defendant is amenable to personal jurisdiction where his defective product causes injury within the forum though he did not intentionally put this product there unless he, the defendant, proves that the presence of his product in the forum was an unforeseeable event.

More recently, the court in *Eyerly Aircraft Co. v. Killian*, 414 F. 2d 591, 596 (5th Cir. 1969), commented:

> The present trend is to * * * hold that a corporation is answerable where it introduces its product into the stream of interstate commerce if it had reason to know or expect that its product would be brought into the state where the injury occurred.

See also Coulter v. Sears, Roebuck and Co., 426 F.2d 1315, 1316 (5th Cir. 1970) ("The reservoir of state jurisdictional power over nonresidents has swollen tremendously in recent years.").

[5] Weissenfels disputes this point. *See* note 3 *supra*.

in the United States under its own brand name, FAIRLINE. Over a four-year period, $75,000 worth of FAIRLINE chain was sold in Arkansas. The chain that allegedly injured the plaintiffs was purchased by their employer, Murfreesboro Lumber Company, from the retail seller, Carroll Building and Appliance Company. Thus, the majority holds that personal jurisdiction exists over an Italian corporation that does not engage in business activity in the United States, and did not manufacture the product that allegedly caused the injury.

Weissenfels' role, if any, was limited to repackaging the chain under its own brand name and selling it abroad to a British corporation that marketed it in the United States, repackaged and renamed again as FAIRLINE. We have no indication of how much of the revenue derived from $75,000 in retail sales in Arkansas reached Weissenfels but, given the large number of intermediaries in this transaction, it is safe to assume not much.

The Supreme Court recently outlined the applicable due process test of the exercise of personal jurisdiction over a foreign corporation:

> Thus, the inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was "present" but on whether there have been
>
> > "such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. *Id.*, at 317, 66 S.Ct., at 158.
>
> Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:
>
> > "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause

> to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.*, at 319, 66 S.Ct., at 160.
>
> Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.
>
> [*Shaffer v. Heitner*, 97 S.Ct. 2569, 2580 (1977), *quoting International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (footnotes omitted).]

The trend among lower courts interpreting the *International Shoe* "minimum contacts"-fairness doctrine has been to expand jurisdiction so as to include any corporation that

> introduces its product into the stream of interstate commerce if it had reason to know or expect that its product would be brought into the state where the injury occurred * * *. [*Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 596 (5th Cir. 1969).]

Indeed, as one court has noted, jurisdiction is presumed unless the *defendant* can prove that the presence of the product in the forum state was an unforeseeable event. *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732, 736 (1966).

The impetus behind this trend has been a concern with past deference to what was fair to the defendant, at the expense of the plaintiff. In my view this is a laudable goal, but the pendulum may have swung too far to the plaintiffs' side. I cannot believe, for example, that exercise of personal jurisdiction over Weissenfels in this case is consistent with constitutional due process requirements established by the Supreme Court in *International Shoe* and recently reiterated in *Shaffer*. Both the

quality and quantity of Weissenfels' contacts with Arkansas are minimal; it neither manufactured the chain nor sold or marketed it in the United States. There is simply no evidence that, indirectly, it derived "substantial revenue" from Arkansas sales. In short, the connection between Weissenfels and Arkansas is gossamer.

Moreover, the plaintiffs in this action do not suffer from a dearth of available defendants. Both the retailer, Carroll Build- and Appliance Company, and the packager and distributor, Fehr, would be logical entities to sue, and indeed, Fehr is a co-defendant in this action. There is no reason to believe that the plaintiffs would suffer from the omission of Weissenfels from the list of defendants.

On the other hand, Weissenfels is burdened substantially by having to defend this lawsuit. It must hire United States' counsel and support personnel, and presumably transport its witnesses to Arkansas from Italy in the event of trial. Naturally, it will be strongly tempted to settle, even if it knows it is not liable, because of the tremendous expense of trying the lawsuit, an expense that bears far more heavily on it than on the other parties.

Ironically, this expense will ultimately be borne by the very individuals that free-wheeling long-arm statutes attempt to protect—the consumers. Weissenfels will simply pass the cost on to the consumers via higher prices for its chains, or if possible, attempt to insure that its products do not reach areas like Arkansas where negligible amounts of revenue do not justify running the risk of being sued.[6]

---

[6] This latter point could have interesting market concentration and antitrust implications. Liberal interpretation of long-arm statutes may put large firms who can market in high volume everywhere at an economic advantage relative to smaller firms with a thinner market. A large firm with a high sales volume may be able to more economically defend a lawsuit arising in, say Arkansas, because of its higher sales volume. The larger firm can spread the substantial cost of litigation over a larger revenue pool than a small firm with a lower volume of business.

Justice Holmes advocated letting accident costs lie where they fall in order to minimize administrative costs, unless some clear social benefit is achieved by shifting them. *See* O. W. Holmes, Jr., *The Common Law* 76-77 (Howe ed. 1963). Analogously, the goals of justice and social benefit will not suffer materially by eliminating Weissenfels as a party-defendant in this lawsuit.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

Opinion of U. S. District Court

United States District Court
Western Distritc of Arkansas
Texarkana Division

Woodrow Hutson, Plaintiff,

v. No. T-76-89-C

Fehr Brothers, Inc. and Acciaierie Weissenfels, Defendants.
John David Epperson, Plaintiff,

v. T-77-4031

Fehr Brothers, Inc. and Acciaierie Weissenfels, Defendants.

Memorandum Opinion

These are product liability cases in which the plaintiffs seek damages for injuries caused by the breaking of a chain. The plaintiffs are citizens of Arkansas. Fehr Brothers, Inc. is incorporated under the laws of New York with its principal place of business in New York City. Acciaierie Weissenfels (hereafter "AW") is an Italian corporation with its principal place of business in Fresine, Valromana, Italy. The amount in controversy in each case exceeds $10,000.00, and this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. An alien corporation is deemed a citizen of the country of incorporation for the purposes of determining diversity jurisdiction. See 1 Moores' Fed. Prac. ¶ 0.75[3]

The complaint in each case alleges that the chain was manufactured by AW and sold to Fehr Brothers, Inc., that Fehr

Brothers Inc. sold the chain to R. B. Carroll, Jr., of Murfreesboro, Arkansas, who in turn sold it to plaintiffs' employer, Murfreesboro Lumber Co.

AW has moved for dismissal of the complaint contending that this Court lacks personal jurisdiction over it. It contends that it performed none of the acts enumerated in Arkansas's long-arm statute, which would subject it to service outside the state and even if this Court found that AW had performed one of the acts enumerated in the long-arm statute, the exercise of personal jurisdiction would violate standards of due process. We hold that AW's motion to dismiss should be denied.

Plaintiffs contend that they were injured on May 9, 1976 in Murfreesboro, Arkansas, by the breaking of a defective chain. Originally plaintiffs asserted the chain was manufactured by AW. They now admit that the chain was manufactured in Yugoslavia, but packaged and distributed by AW as its own product. After packaging the chain, AW sold it to Frank Fehr & Company, a British corporation, pursuant to an exclusive distributorship agreement. Through its American subsidiary, Fehr Brothers, Inc., the British Corporation, sold AW chain throughout the United States. Fehr Brothers sold the chain which is the subject of this lawsuit to R. B. Carroll d/b/a Carroll Building and Appliance Company in Murfreesboro, Arkansas. From October 1, 1972 through September 30, 1976, Fehr Brothers sold $74,551.35 worth of AW chain to Arkansas customers and distributed advertising brochures within Arkansas on AW products.

AW was served in Italy in accord with Italian law.

Ark. Stat. Ann. § 27-2502(c)(1)(d) provides in part as follows:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's

(d) causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State;

Subsection D of the same statute authorizes service outside the State of Arkansas when personal jurisdiction is authorized §27-2502(c). Ark. Stat. Ann. §27-2503(1)(b) (1975 Supp.) authorizes service outside Arkansas "in the manner prescribed by the law of the place in which the service is made. . . ."

We find that AW subjected itself to the jurisdiction of the courts in Arkansas in that it caused a tortious injury within Arkansas by an act or omission occurring in Italy and that AW derived substantial revenue from goods consumed in Arkansas. "Substantial revenue" derived from goods consumed within Arkansas can be found even though such sales constitute a miniscule percentage of the defendant's total business throughout the world. *Pennsalt Chem. v. Crown Cork & Seal*, 244 Ark. 638, 426 S.W. 2d 417 (1968); *International Harvester Co. v. Hendrickson Mfg. Co.*, 249 Ark. 298, 459 S.W. 2d 62 (1970). In other words the determination of whether a defendant derives substantial revenue from sale of its products within Arkansas is to be made with regard only to those sales occurring in Arkansas. This Court finds that sales by Fehr Brothers totalling $74,551.35 provided the defendant AW with substantial revenue.

Ark. Stat. Ann. §27-2501(c)(1)(d) does not require that the defendant in question to have effectuated the sales within Arkansas. It only requires that the defendant derive substantial revenue from goods consumed within Arkansas and that the tortious injury stem from those goods. Extraterritorial service on AW is therefore authorized by the Arkansas long-arm statute.

Defendant AW argues that application of §27-2501(c)(1)(d) to the facts of this case would violate standards of due process of law. Defendant relies upon language in *Hanson v. Denkla*, 357 U.S. 235, 253 (1958), which was recently cited with approval in *Shaffer v. Heitner*, — U.S. — (June 24, 1977), to the effect that a defendant must have "purposefully avail[ed] itself of the privilege of conducting activities in the forum state" to subject itself to personal jurisdiction. AW argues that it sold the chain in question to Frank Fehr; that in doing so it lost all right to control the destination of the chain; and that due to loss of control over the chain, AW never purposefully availed itself of the privilege of conducting activities in Arkansas.

This same argument was rejected twice by the Arkansas Supreme Court. *Pennsalt Chem. v. Crown Cork & Seal, supra; International Harvester v. Hendrickson Mfg., supra.* We recognize that a federal question is raised concerning whether federal due process standards would be violated by holding AW subject to the jurisdiction of this Court. We hold that on the alleged facts of this case, the phrase "purposefully avails itself of the privilege of conducting activities" includes the actions of AW. We reach this result because AW's product which it allegedly packaged and warranted as its own is the subject matter of this litigation. In delivering the chain to Frank Fehr and Company, AW must have anticipated that the chain would be distributed in all fifty states of the United States. It must have foreseen that its product would be sold within Arkansas.

AW was not the entity which consummated the sale within Arkansas. If this fact were decisive and if a foreseeability test for "purposely avails itself" were not applied in products liability case, an injured person would almost always be left with no direct recourse against the manufacturer of the product causing his injury. There is a growing public policy in favor of giving an injured person recourse against the manufacturer and/or

distributor of a product which causes his injury, as manifested by diminishing emphasis on "privity of contract." In Arkansas the lack of privity of contract is not a defense available to a manufacturer or distributor. Ark. Stat. Ann. §85-2-318.1 (1975). The effect of this statute would be nullified in almost every case arising in an Arkansas forum if this Court were to adopt defendant's interpretation of the phrase "purposefully avails itself of the privilege of conducting activities in the forum state." We therefore hold that in products liability cases, such language precludes extrastate service pursuant to state law only if the defendant could not have foreseen that his product would be sold within the forum. *See Packard v. Cessna Aircraft Co.*, 366 F. Supp. 966 (D. Alaska 1973).

The Clerk will prepare orders overruling AW's motions to quash service and dismiss the complaint and ordering AW to answer within thirty (30) days.

Date: This 22 day of August, 1977.

/s/ PAUL X WILLIAMS

APPENDIX D

Constitutional and Statutory Provisions

14th AMENDMENT

§ 1. [Citizenship—Due process of law—Equal protection] —All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARK. STATS. ANN. § 27-2502

27-2502. Bases of personal jurisdiction over persons outside this state—A. Definition of "person." As used in this section, "person" includes an individual or his executor, administrator or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State.

B. Personal jurisdiction based upon enduring relationship. A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this State as to any cause of action.

C. Personal jurisdiction based upon conduct.

1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in this State;

(c) causing tortious injury by an act or omission in this State;

(d) causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State;

(e) having an interest in, using, or possessing real property in this State;

(f) contracting to insure any person, property, or risk located within this State at the time of contracting; or

(g) receipt, whether in or out of this State, as a creditor or distributee or one claiming as such, of money or property from an executor, administrator or other personal representative serving under appointment by any probate court of this State.

2. When jurisdiction over a person is based solely upon this section, only a (cause of action) (claim for relief) arising from acts enumerated in this section may be asserted against him.

D. Service outside the State. When the exercise of personal jurisdiction is authorized by this section, service may be made outside this State.

E. Inconvenient forum. When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

F. Other bases of jurisdiction unaffected. A court of this State may exercise jurisdiction on any other basis authorized by law.

Supreme Court, U. S.
FILED
OCT 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-515

FEHR BROTHERS, INC., *Petitioner*
v.
ACCIAIERIE WEISSENFELS, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

COUNTER-STATEMENT OF THE CASE 1

ARGUMENT 5

I. The Decision Below Is Consistent with the Opinions of this Court 5

II. There is No Conflict Between the Decision Below and the Decisions of Other Courts of Appeals .. 9

CONCLUSION 17

APPENDIX 1a

TABLE OF AUTHORITIES

CASES:

Aftanase v. *Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965) 15

Ajax Realty Corp. v. *J. F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) ..12, 14, 15

Duple Motor Bodies, Ltd. v. *Hollingsworth*, 417 F.2d 231 (9th Cir. 1969) 12, 13, 14

Eyerly Aircraft Co. v. *Killian*, 414 F.2d 591 (5th Cir. 1969) 12, 13

Gray v. *American Radiator & S.S. Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961) 16

Hanson v. *Denckla*, 357 U.S. 235 (1958) 5, 6, 9, 11, 16

Honeywell, Inc. v. *Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975) 13, 14

International Shoe Co. v. *State of Washington*, 326 U.S. 310 (1945) 5, 6, 9

Kansas City Southern Railway v. *Anderson*, 233 U.S. 325 (1914) 9

Kulko v. *Superior Court of California*, 98 S. Ct. 1690 (1978) 5

Leasco Data Processing Equipment Corp. v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972) 12

Page

McGee v. *International Life Insurance Co.*, 355 U.S. 220 (1957) 5, 7
Pendzimas v. *Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961) 10
Shaffer v. *Heitner*, 433 U.S. 186 (1977) 5
Uppgren v. *Executive Aviation Services, Inc.*, 304 F. Supp. 165 (D. Minn. 1969) 16
Velandra v. *Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) 10, 11
Weaver v. *Palmer Brothers Co.*, 270 U.S. 402 (1926) .. 9
W. T. Grant Co. v. *Unitika Tsusho KK*, Civ. No. 74-285 (D. Vermont, October 27, 1977) 10, 11, 12

STATUTES:

ARK. STAT. ANN. § 27-2502(C)(1)(d) 3

MISCELLANEOUS:

Restatement (Second) of Foreign Relations Law § 18 (1965) 12

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---

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

COUNTER-STATEMENT OF THE CASE

The petitioner in this case is Fehr Brothers, Inc. (hereinafter "Fehr Brothers"). It is a New York corporation with its principal place of business in New York City. Petitioner is also the American subsidiary of a British corporation, Frank Fehr & Co., Ltd. (hereinafter "the British parent"; petitioner and its parent are herein referred to collectively as "the Fehr organization"). Respondent is Acciaierie Weissenfels, s.p.a. (hereinafter "Weissenfels"), an Italian corporation which has sold chains to the Fehr organization.

The petition for certiorari arises out of a personal injury action filed in the U.S. District Court for the Western District of Arkansas. Two men working in Murfreesboro, Arkansas were injured on May 9, 1976 when a three-eighths inch chain broke. Their employer had purchased the chain from the Carroll Building and Appliance Co. of Murfreesboro. The chain bore the imprint "Yugoslavia" and was taken from an open barrel sitting on the floor of that hardware store. The open barrel bore the label FAIRLINE, the trademark used by petitioner. The fact that the barrel was one used by the Fehr organization is the only evidence that has been advanced to link this Yugoslav chain with respondent, an Italian corporation having no production facilities in Yugoslavia.[1]

In their diversity action, the injured workmen named as defendants both petitioner Fehr Brothers and respondent Weissenfels. The plaintiffs initially claimed that respondent had manufactured the chain in question. Subsequently, they conceded that respondent could not have manufactured the chain. District Court Memorandum of August 22, 1977 (hereinafter "Dist. Ct. Op."), Petn at A-31. Plaintiffs now claim that respondent purchased the chain from a manufacturer in Yugoslavia, repackaged it under petitioner's trademark, and sold it to petitioner. Petitioner allegedly resold the chain to an Arkansas wholesaler, which in turn resold it to Carroll Building and Appliance Co., which finally resold it to plaintiffs' employer. Respondent

[1] Discovery has adduced evidence of other possible sources from which Carroll Building and Appliance Co. may have obtained the Yugoslav chain. In fact, one of the parties has filed a cross-complaint against an American company which imports Yugoslav chain.

has consistently denied that it manufactured, purchased or repackaged the particular chain in question.[2]

Respondent Weissenfels has its principal place of business at Fusine, Italy. Respondent is not licensed to do business in Arkansas and has never transacted any business in the state. Respondent has never had an office or place of business in Arkansas. No employee or representative has ever visited Arkansas on its behalf. Respondent has never entered into a contract to sell any products or services in Arkansas, nor has it ever solicited or advertised for business in that state. In particular, respondent has never sold or shipped chain into Arkansas.

During the period relevant to this case, respondent had a sales agreement with Frank Fehr & Co., Ltd., the British parent of petitioner. This agreement gave the British parent the exclusive right to sell chain manufactured by respondent in certain specified areas, including the whole of North America. Under the agreement, the Fehr organization had the exclusive right to resell and invoice the chain in its own name. For most of the United States, petitioner was the British company's selling arm. The Fehr organization always exercised complete control over the selection of its customers and all other marketing decisions. After the chains were placed on ships in Italy, respondent had no interest in or control over them. All of the chains sold by respondent to the Fehr organization were marketed by the Fehr organization under its own brand name, FAIRLINE.

Jurisdiction over respondent was asserted on the basis of Arkansas Stat. § 27-2502(C)(1)(d), which pro-

[2] For purposes of the interlocutory appeal, the Court of Appeals assumed that respondent repackaged the chain. Petn. at A-3.

vides that a court may exercise jurisdiction over a person who causes tortious injury in the State by an act or omission outside the State "if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State." The complaints filed in these personal injury actions did not allege that respondent had derived any revenues from business in Arkansas. They did, however, allege that petitioner had derived substantial revenues—later stated by petitioner to be $74,551.35—from the sale of Weissenfels chains in Arkansas during the period 1972-76.[3]

Respondent moved to dismiss the complaint on the ground that the District Court lacked personal jurisdiction over it. The District Court denied this motion, but certified the question to the Court of Appeals for the Eighth Circuit. The Eighth Circuit initially affirmed the trial court by a divided vote. Petn at App. B. On rehearing *en banc*, however, the Court of Appeals held that the exercise of jurisdiction over respondent in the circumstances of this case would violate its right to due process under the Fourteenth Amendment. Opinion of August 18, 1978 (hereinafter "En Banc Op."), Petn at App. A.

Fehr Brothers, Inc. seeks a writ of certiorari to review that decision. For the reasons stated herein, that petition should be denied.

---

[3] Although the courts below accepted this assertion, subsequent discovery has revealed that during the relevant time period, the Fehr organization bought chain from other sources, including Yugoslavian manufacturers. It is not clear what portion, if any, of the $74,551.35 relates to respondent's chain.

ARGUMENT

I. The Decision Below Is Consistent with the Opinions of this Court

This Court has consistently held that personal jurisdiction cannot be exercised over a non-resident defendant unless that defendant has had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 316 (1945); *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957). In *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958), a very concrete test was established for determining whether the requisite "minimum contacts" are present:

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

In each of the last two terms, this Court has explicitly reaffirmed this limitation on the scope of personal jurisdiction. *Kulko* v. *Superior Court of California,* 98 S. Ct. 1690, 1698 (1978); *Shaffer* v. *Heitner,* 433 U.S. 186, 216 (1977).

This, then, is not an area in which the law is unclear or unsettled. This Court has established and repeatedly reaffirmed a concise test, leaving it to the lower courts to make the factual analyses necessary to apply that test. Obviously, such analyses may present difficulties, but those factual difficulties must be and can be resolved by the lower courts.

In the present case, the Court of Appeals specifically applied the principles established by this Court in

International Shoe, Hanson v. *Denckla* and the other cases noted above. The Court of Appeals found that respondent Weissenfels had not had sufficient contact with the State of Arkansas to warrant exercise of *in personam* jurisdiction:

> Weissenfels' contacts with Arkansas consist only of the fortuitous introduction of Weissenfels products into the forum state through the decision of Frank Fehr & Co., a British company. Weissenfels neither manufactured the defective chain nor sold or marketed it in the United States. Weissenfels' only apparent connection with the chain was that at one time it repacked and resold it to Frank Fehr & Co. These are insufficient "minimal contacts" with the forum state for Arkansas to exercise jurisdiction over Weissenfels. Weissenfels did not consciously solicit or purposefully avail itself of the privilege to conduct business in the forum state, as *Hanson* requires for the exercise of jurisdiction. 357 U.S. at 253. The Fehr Co. exercises control over the selection of the customers and other marketing decisions relating to the sales of the Weissenfels products which it purchases. We recognize that the State of Arkansas has a strong interest in providing a forum for its residents who are injured by defective products of foreign corporations and that Weissenfels did repackage and resell the chain to Frank Fehr & Co. Nevertheless, *in personam* jurisdiction simply cannot rest on such a frail foundation. (Footnote omitted.)

En Banc Op., Petn at A-7 - A-8.

As directed by this Court in *International Shoe*,[4] the Court of Appeals balanced respondent's *de minimus* contact with Arkansas against the great inconvenience of requiring respondent, an Italian corporation with no office or sales effort in the United States, to litigate in Arkansas. The Court noted that respondent is burdened substantially by the choice of that forum because it must hire local counsel and transport its witnesses from Italy to Arkansas. The Court of Appeals emphasized that because the expense "bears far more heavily on [respondent] than on other parties," maintenance of the suit against respondent in Arkansas generates unfair pressure for respondent to settle. En Banc Op., Petn at A-8. This is not a case in which an individual plaintiff is at a "severe disadvantage" vis-a-vis an American commercial enterprise with commercial activities in several states. *Compare McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957). Rather, the petition is an attempt by a New York-based concern to force an Italian corporation to answer in an inconvenient Arkansas forum regarding a sale consummated entirely in Europe.

In this connection, it should be noted that the original plaintiffs have not filed a petition for certiorari in this Court.[5] The party seeking certiorari is Fehr Brothers. Fehr Brothers has a pending cross-claim against the retailer; Fehr Brothers' only interest is to preserve its additional cross-claim against respondent Weissenfels. Yet that cross-claim need not be prosecuted in Arkansas. Fehr Brothers is a New York corporation, and respondent has conceded that it is prop-

[4] In *International Shoe*, the Court explicitly recognized that "[a]n 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant" to an analysis of the adequacy of the contacts. 326 U.S. at 317.

[5] The Court of Appeals recognized that "plaintiffs in this action do not suffer from a dearth of available defendants." En Banc Op., Petn at A-8, n.1. Indeed, subsequent to the decision below, the retailer, the wholesaler, and one of its suppliers have been impleaded as third-party defendants.

erly subject to suit in New York.[6] Thus, Arkansas has little interest in providing a forum for resolution of this potential controversy between Fehr Brothers and Weissenfels.

In sum, the Eighth Circuit applied the tests which this Court has mandated. It concluded that Weissenfels did *not* have sufficient "minimum contacts" with Arkansas and had *not* done any "act by which [it] purposefully avail[ed] itself of the privilege of conducting activities within" Arkansas. Petitioner does not contend that the Court below failed to apply the appropriate tests. Nor does it contend that this Court should abandon those tests. Rather, petitioner is dissatisfied with the *factual analysis* utilized by the Court of Appeals in applying the appropriate tests to this case. In petitioner's opinion, the Court below should have given greater weight to the facts that the Fehr organization had the exclusive distributorship for Weissenfels chain throughout North America, that Weissenfels' identity as the supplier was mentioned in one or more of the Fehr Brothers catalogs, and that Fehr Brothers derived approximately $74,000 in revenue from the sale of Weissenfels chain in Arkansas over a five-year period. The Court was well aware of all of these facts. That it did not find "minimum contacts" between Weissenfels and the State of Arkansas

[6] Respondent advised the Court of Appeals that "there are states, such as New York, where Weissenfels has had sufficient direct contacts so that jurisdiction over Weissenfels would be appropriate under the due process standards established by the Supreme Court." Brief of Appellant (Weissenfels) at 17.

is understandably disappointing to petitioner, but it provides no basis for granting certiorari.[7]

II. There is No Conflict Between the Decision Below and the Decisions of Other Courts of Appeals

In its decision in this case, the Court of Appeals followed the same criteria as have been consistently applied by all other circuits—the tests enunciated by this Court in *International Shoe, Hanson* v. *Denckla* and the other decisions discussed in part I, above. Petitioner does not contend that there is a split among the circuits as to these principles of *in personam* jurisdiction. Petitioner seeks to manufacture a disagreement by arguing that the *factual analyses* pursuant to these recognized legal principles have varied among federal courts. Specifically, petitioner contends that there is a "trend" in the case law which, if carried to "the next logical step," would find jurisdiction to be proper in this case simply because Weissenfels introduced its chain "into the stream of [international] commerce" and thus could "foresee" that it *might* be sold *anywhere*. Petn at 12.

Neither federal appellate nor district courts have found such a tenuous connection between the out-of-

[7] Petitioner also suggests—incorrectly—that the Eighth Circuit's decision has the effect of declaring the Arkansas long-arm statute unconstitutional. As this Court has cautioned "[e]very opinion is to be read having regard to the facts of the case and the question actually decided." Weaver v. Palmer Bros. Co., 270 U.S. 402, 414 (1926). The only issue decided by the Eighth Circuit was that, under the facts presented herein, Acciaierie Weissenfels is not subject to service of process in Arkansas. The constitutionality of the state's long-arm statute was not even considered. *Cf.* Kansas City Southern Ry. v. Anderson, 233 U.S. 325, 329 (1914). The Eighth Circuit has simply recognized that there is a due process limit on the scope of any state's *in personam* jurisdiction.

state defendant and the forum State to constitute the requisite "minimum contacts" for exercise of *in personam* jurisdiction.[8] To the contrary, the courts have consistently rejected jurisdictional arguments which are based upon nothing more than an allegation that the nonresident defendant placed its product in the stream of interstate or international commerce. *E.g.*, *Velandra* v. *Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964); *W. T. Grant Co.* v. *Unitika Tsusho KK*, Civ. No. 74-285 (D. Vermont, October 27, 1977) (attached as appendix hereto); *Pendzimas* v. *Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961).

In *Velandra* v. *Regie Nationale Des Usines Renault, supra*, for example, a person injured in an automobile accident in the State of Michigan sought to sue a French automobile manufacturer which sold its product in the United States through a wholly-owned New York subsidiary, Renault, Inc. Renault, Inc. in turn distributed the automobiles to the midwest region through a wholly-owned subsidiary called Great Lakes, Inc. This regional distributor granted franchises to several Michigan dealers. Despite evidence that one of the three Renault dealers in Detroit had gross sales of more than $100,000 and that, upon each sale, a warranty from the French manufacturer was delivered to the purchaser, the Court of Appeals held that "no sufficient showing has been made with reference to sales of the defendant's products within Michigan to establish such minimum contacts within the State as to warrant subjecting the defendants to the personal jurisdiction of a court in Michigan." 336 F.2d at 297.

[8] There is no conflict between the Court of Appeals' decision and the Arkansas Supreme Court's interpretation of the state's long-arm statute. The state Supreme Court has never decided whether a non-United States distributor whose merchandise eventually finds its way into Arkansas is subject to service of process absent additional facts. Accordingly, one cannot accept petitioner's assumption that the Arkansas Supreme Court would disagree with the Court of Appeals' resolution of the pending matter.

Even more similar to the case at bar is *W. T. Grant Co.* v. *Unitika Tsusho KK, supra*, which is reproduced in the Appendix hereto. There W. T. Grant Co. ("Grant"), a major American retailer, was the defendant in a product liability action. Grant filed a third-party complaint against the Japanese manufacturer from which the product (pajamas) had been purchased. The record indicated that Grant had been a customer of the Japanese manufacturer for a number of years; that Grant had sent representatives to Japan to negotiate; and that Grant had purchased from the defendant more than $1,000,000 worth of children's pajamas annually. The shipment containing the allegedly defective product had been shipped F.O.B. a Japanese port directly to the United States.

Despite these contacts, the District Court specifically held that the manufacturer had not "purposefully availed itself of the privilege of conducting activities in the forum state." App. at 6a *citing Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). The court reasoned that a defendant cannot be said to have voluntarily invoked the laws of the forum state unless it could have specifically foreseen that the goods would be used in the forum state:

> Foreseeability in the context of *in personam* jurisdiction, especially in a situation involving international considerations such as the one present here, requires that the defendant has actual knowledge, or good reason to know, that the conduct will

have effect in the forum state. *See Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1341 (2d Cir. 1972).

The court noted that the Japanese defendant had denied any knowledge or concern as to where the goods were marketed by Grant:

> These averments, together with the fact that W. T. Grant had, at the time, stores in 43 states and an interest in a Canadian department store chain, greatly weakens [*sic*] any contention that this contact with Vermont was foreseeable in the sense discussed above, much less that Unitika had actual knowledge of it.

App. at 5a. Thus the Japanese defendant was held not to be susceptible to suit in Vermont.[9]

In its effort to portray a conflict among the circuits, petitioner cites *Eyerly Aircraft Co.* v. *Killian,* 414 F.2d 591 (5th Cir. 1969); *Duple Motor Bodies, Ltd.* v. *Hollingsworth,* 417 F.2d 231 (9th Cir. 1969); *Ajax Realty*

[9] The *W. T. Grant* court relied upon Judge Friendly's opinion for the court in Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972). In analyzing a question of personal jurisdiction in that case, Judge Friendly noted the general principle that a state may assert jurisdiction over an entity which causes effects within the state by an act done elsewhere, but warned that "[t]his is a principle that must be applied with caution, particularly in an international context." 468 F.2d at 1341. He emphasized that the effect must occur "as a direct and foreseeable result of the conduct outside the territory." *Id., quoting* Restatement (Second) of Foreign Relations Law § 18 (1965). In the view of the Second Circuit, "attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support *in personam* jurisdiction. The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him." 468 F.2d at 1341.

Corp. v. *J. F. Zook, Inc.,* 493 F.2d 818 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); and *Honeywell, Inc.* v. *Metz Apparatewerke,* 509 F.2d 1137 (7th Cir. 1975). Petn at 11-13. These decisions are not in conflict with the Eighth Circuit's resolution of the instant case. In each of the cited decisions, the defendant had significant direct contacts with the forum state.

In *Eyerly Aircraft Co.* v. *Killian, supra,* upon which petitioner places principal emphasis, the defendant had regularly transacted business in the forum state:

> Included in this enumeration of contacts with Texas are the following: (1) sales and deliveries of amusement devices and parts directly into the state; (2) the extension of credit in the state; (3) the retention of liens on items sold; (4) the filing of such liens with state and county authorities; (5) the servicing of machines in the state; and (6) the solicitation of business in the state. These contacts with Texas were neither occasional nor sporadic—they were both continuous and substantial.

414 F.2d at 594-95 (footnote omitted). This abundance of direct contacts makes *Eyerly Aircraft* wholly inapposite here.

Equally inapposite are cases cited by petitioner which involved a defendant who was actually aware that the particular product was to be used or sold in the forum state. For example, in *Duple Motor Bodies, Ltd.* v. *Hollingsworth, supra,* the court stressed that the defendant had actual knowledge of the ultimate destination of its custom-made products:

> The [coach] bodies were designed and manufactured by appellant with the knowledge that they were to be used in Hawaii and were made with

> special modifications to adapt them for use there. Prior to purchase a representative of Maui Island Tours [the purchaser] went to London and visited appellant's factory, and with representatives of appellant and Vauxhall, discussed paint specifications. Following the sale, appellant responded to an order for spare parts from [the purchaser] and at that time solicited further business from that concern.

417 F.2d at 234-35. This actual knowledge is a far cry from the diffuse concept of "foreseeability" proffered by petitioner.

Similarly, in *Honeywell, Inc.* v. *Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975), the foreign defendant had actual knowledge that any injury which might occur from its acts would be injury to a resident of the forum. The nonresident defendant in that patent infringement action had originally sought a license under the patent from the Honeywell Corporation, which has its headquarters in Illinois, the forum state. The defendant, then, was clearly aware that the patent holder—the party to whom injury would occur if the patent were infringed—was a resident of the forum. It was on the basis of this actual knowledge that the Court of Appeals found that the defendant "should reasonably have anticipated" that Honeywell would suffer injury in Illinois. 509 F.2d at 1144. Indeed, the court explicitly distinguished *Honeywell* from the situation presented by the instant petition, noting that the defendant "was not merely a foreign manufacturer which sold to various foreign exporters, knowing that the exporters would, in turn, sell to distributors throughout the world, including the United States." *Id.*

The final case relied upon by petitioner, *Ajax Realty Corp.* v. *J. F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972),

cert. denied, 411 U.S. 966 (1973), involved a nonresident defendant whose direct contacts with the forum state made it clear that the defendant could "foresee" the use of its product in that state. In *Ajax Realty*, the defendant was a window frame manufacturer which, unlike respondent Weissenfels, had shipped its product directly into the forum state. When the window frames leaked, the defendant sent a representative there to see whether the frames could be repaired. It was these direct contacts with the forum which resulted in a finding that the defendant had "a reasonable expectation that the frames would be used in Virginia." 493 F.2d at 822. The Court of Appeals held that the application of the Virginia statute to the defendant "on these facts" did not violate due process. *Id.* at 823.

There is no conflict among the circuits. This Court has clearly set forth the criteria for the extension of *in personam* jurisdiction; the various Courts of Appeals have consistently applied those criteria. Where "minimum contacts" exist, *i.e.*, the defendant "does some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State," jurisdiction has been sustained.[10] But where, as was found to

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[10] It is also instructive to contrast the case *sub judice* with then Judge Blackmun's opinion in Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965). In sustaining jurisdiction in a case of injury to a Minnesota resident, the Court emphasized that the product had been

> shipped . . . directly into the state and directly to the customer. There was no intervening dealer. Economy knew of the [product's] destination and of the Minnesota identity of the purchaser. It voluntarily placed its product on the Minnesota market, derived benefit therefrom, received the protection of Minnesota laws, and reasonably could have anticipated that

be the case here, the defendant's contacts with the state are extremely tenuous, the exercise of jurisdiction has consistently been rejected.[11]

A conflict among the circuits cannot be created by talk of a "trend" toward expanding jurisdictional reach. To the extent that any such "trend" may be perceived, it is a trend in the weighing of facts, not in the legal criteria applicable to *in personam* jurisdiction. Moreover, this Court has explicitly rejected the extension of any such trend to a point where direct and tangible contacts with the forum would no longer be required:

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.

Hanson v. *Denckla*, 357 U.S. at 251.

Respondent respectfully submits that *only* "the eventual demise of all restrictions on the personal jurisdiction of state courts" would make it possible for the State of Arkansas to exercise *in personam* jurisdiction over respondent Acciaierie Weissenfels.

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this activity would have consequences in the state. See Gray v. American Radiator & S.S. Corp., 22 Ill.2d 432, 176 N.E.2d 761, 766 (1961).

343 F.2d at 197.

[11] One district court has summarized the case law thusly:

> Suffice it to say that this court reads none of these cases to hold that any foreign manufacturer or distributor whose product reaches the forum state and causes injury therein, *in the absence of any additional facts*, is amenable to in personam jurisdiction in that state consistent with due process. Each case which upheld jurisdiction exhibited significant additional factors.

Uppgren v. Executive Aviation Services, Inc., 304 F. Supp. 165, 170 (D. Minn. 1969) (emphasis in original).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

W. T. GRANT CO. (*Defendant/Third Party Plaintiff*)

v.

UNITIKA TSUSHO KK (*Third Party Defendant*)

Civil Action

File No. 74-285

Filed October 27, 1977

Memorandum and Order

This third party action derives from a products liability action instituted by Lisa Dufault against W. T. Grant Co. as the sole defendant. Grant, as a third party plaintiff with leave of the court, has undertaken to implead its supplier of the alleged defective product, Unitika Tsusho K.K., the third party defendant, under Rule 14(a), Fed.R.Civ.P. Service of the third party complaint was made on the strength of the Vermont long arm statute (12 V.S.A. §§ 855-856). Unitika has moved to dismiss the third party complaint by challenging the jurisdictional reach of the Vermont statute. Plaintiff Dufault filed a motion to sever the third party action. This court granted plaintiff's motion and denied the motion of Unitika without prejudice to renewal if plaintiff prevailed in the main action. Subsequently the jury rendered a verdict for the plaintiff and judgment was entered accordingly on February 18, 1977. W. T. Grant Co. having been found liable, third party defendant Unitika has renewed its motion to dismiss. Hearing on the motion was held on September 30, 1977.

The Vermont long arm statute [1] provides in essence that if contact or activity in the State of Vermont of, or imputable to, a foreign corporation is sufficient to support a Vermont personal judgment against it, the corporation shall be deemed to be doing business in the state and service may be made on the secretary of state in any action against the corporation arising out of that contact or activity.

Unitika contends that it has had no contact with Vermont and that none can be imputed to it through its activity elsewhere or through the activity of others. Grant, on the other hand, argues that when Unitika sold its products to Grant, knowing that Grant would distribute the product in the United States, Unitika knew or should have known that the product might be marketed in Vermont. Grant urges that such foreseeable distribution of Unitika's product by Grant brings Unitika within reach of the Vermont statute.

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[1] 12 V.S.A. § 855 reads as follows:

§ 855. *Doing business as appointment of process agent*

If the contact with the state or the activity in the state of a foreign corporation, or the contact or activity imputable to it, is sufficient to support a Vermont personal judgment against it the contact or activity shall be deemed to be doing business in Vermont by that foreign corporation and shall be equivalent to the appointment by it of the secretary of the state of Vermont and his successors to be its true and lawful attorney upon whom may be served all lawful process in any action or proceedings against it arising or growing out of that contact or activity, and also shall be deemed to be its agreement that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served on the foreign corporation at its principal place of business in the state or country where it is incorporated according to the law of that state or country.—Amended 1967, No. 353 (Adj. Sess.), § 5, eff. July 1, 1968; 1971, No. 185 (Adj. Sess.), § 43, eff. March 29, 1972.

The question must be answered in accordance with state law. "Federal law" controls only on constitutional issues, such as whether the Vermont statute comports with the due process guarantees of the Fourteenth Amendment as embodied in the "minimum contacts" requirement enunciated in *International Shoe* v. *State of Washington*, 326 U.S. 310, 316 (1945). See *Arrowsmith* v. *United Press International*, 320 F.2d 219, 222 (2d Cir. 1963).

O'Brien v. *Comstock Foods, Inc.*, 123 Vt. 461 (1963), considered the question of *in personam* jurisdiction over a foreign corporation. In *O'Brien* the Vermont Supreme Court construed the Vermont long arm statute to establish what it termed a "vital factor," that the non-resident defendant intentionally and affirmatively acted in pursuit of its corporate purposes within the State of Vermont. This intentional and affirmative action may take the form of direct shipment of goods into the Vermont market or by way of transmittal through regular distributor presently serving Vermont. The plaintiff's pleadings must demonstrate that, in one of these ways or perhaps in some other way, "the defendant is causally responsible for the presence of the injuring agency within the State of Vermont." A plaintiff does not meet this burden by merely alleging that a defendant put its product "into the stream of commerce." Id. at 464-465; see also *Anderson* v. *Abex Corp.*, 418 F.Supp. 5 (D.C. Vt. 1975).

The third party defendant Unitika Tsusho K.K. is a Japanese corporate subsidiary of Unitika Ltd., a Japanese corporation, that is not a party to this action. The parent company manufactures various articles including children's pajamas which are then distributed and sold by Unitika Tsusho. W. T. Grant has been a customer of Unitika Tsusho since sometime prior to 1967 and, as such, has made several visits to Unitika's offices in Osaka, Japan on the subject of the sale of children's pajamas. Over the years these meetings have resulted in several purchases by Grant. During each of the years 1970 and 1971 Grant purchased

children's pajamas from Unitika Tsusho in an amount exceeding $1,000,000. One of the purchases is evidenced by purchase order #34-8 dated Oct. 12, 1970. According to Unitika, if they have made a sale of the pajamas in question to Grant, it would have been made under this purchase order. This particular sale was FOB Japanese Port, with the destination of Liberty Park, New Jersey, noted by Grant on its purchase order. This was consistent with their normal dealings which prevailed until November of 1970 when Grant opened its Far East Operations Office in Osaka.

Although on three occasions in 1969 and in the early 1970's Unitika Tsusho's representatives met in New York with W. T. Grant's employees to discuss sales, virtually all phases of the contractual negotiation and purchases occurred in Japan or by correspondence between New York and Japan. Other than these visits, the only direct contact with the United States has been by the parent company and has been in New York State. These contacts consisted of the incorporation of two subsidiaries, Unitika America Corp. and Unitika Marketing Services, Inc., in 1973 and 1974 respectively, after the sale of the pajamas to plaintiff Dufault by W. T. Grant in Burlington.

Unitika Tsusho denies, through affidavits and answers to interrogatories, any contact with the State of Vermont, either through direct shipments to the state or through indirect shipments by way of regular distributors. It also denies ownership of any type of property within the state, having officers or employees in the state or visiting with business purposes, or of engaging in any type of conduct in the State of Vermont. W. T. Grant has failed to adduce any information to rebut these denials.

Personal jurisdiction in Vermont over Unitika Tsusho turns entirely on the fact that Unitika sold children's pajamas to W. T. Grant in Japan, which Grant then shipped to the United States and distributed to its retail stores. The pair of pajamas which gave rise to the main action were

sold to Lisa Dufault's grandmother at Grant's Burlington store. On principles stated by the Vermont Supreme Court in *O'Brien* v. *Comstock Foods, Inc.*, the facts presented do not support personal jurisdiction over Unitika Tsusho. The bare allegation that the defendant placed goods in the stream of commerce, which were ultimately sold in Vermont, standing alone is not sufficient. There is no indication that Unitika had any involvement in, or knowledge of Grant's marketing plans for the pajamas it purchased from Unitika. To the contrary, Unitika's denial of any such knowledge or involvement is not opposed.

Foreseeability in the context of *in personam* jurisdiction, especially in a situation involving international considerations, such as the one present here, requires that the defendant has actual knowledge, or good reason to know, that the conduct will have effect in the forum state. See *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972).

The third party complaint does charge that Unitika knew that Grant would distribute the pajamas here involved through its chain of retail stores situated in the United States and that the pajamas would be sold in Vermont by Grant. However, in affidavits Kazuhide Kajiki, general manager at the relevant time, and Hisao Sato, manager of Unitika's export-import department, deny any knowledge or concern with where Grant planned to distribute the pajamas. These averments, together with the fact that W. T. Grant had, at the time, stores in 43 states and an interest in a Canadian department store chain, greatly weakens [*sic*] any contention that this contact with Vermont was foreseeable in the sense discussed above, much less that Unitika had actual knowledge of it.[2] The present case is

[2] Due to the fact Grant filed a petition under Chapter XI of the Bankruptcy Act on October 2, 1975, the precise nature and degree of Grant's interest in these stores and the Canadian chain is in doubt. However, the figures are valid for time involved in the sale and distribution of the pajamas by Grant in this matter.

distinguishable from *Miller* v. *Cousins Properties Inc.*, 378 F.Supp. 711 (D.C. Vt. 1974). There personal jurisdiction was asserted and sustained as to the defendant North American Rockwell, the manufacturer of an airplane which crashed in Vermont. The contact in Vermont was foreseeable from the very nature of the product involved (see also *Gill* v. *Fairchild Hiller Corp.*, 312 F.Supp. 916 (D.C.N.H. 1970)) and the defendant Rockwell was authorized to do business in this jurisdiction. Neither factor is present here. Unitika has submitted the affidavit of Hisao Sato which affirms that Unitika is not registered or qualified to do business in Vermont. Moreover, pajamas obviously are not comparable to aircraft designed for long range transportation in terms of their likelihood of contact with Vermont.

Given this state of the record, it cannot be said that Unitika has "purposefully availed itself of the privilege of conducting activities in the forum state." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1957). Nor has it voluntarily come into contact with or intentionally participated in the Vermont market as required by *O'Brien* v. *Comstock Foods, Inc.* To the contrary, Unitika's actions throughout its dealings with Grant, whether intentional or fortuitous, have effectively insulated its activity from Vermont and apparently from the other states with the exception of New York.[3]

The facts presented fail to meet the demands required of personal jurisdiction over Unitika in Vermont under the State's long arm statute. The record fails to yield up sufficient contacts by Unitika in Vermont to generate the power in the courts of this jurisdiction to hold this corporation liable as a third party defendant within the teaching of *Hanson* v. *Denckla, supra*, 357 U.S. at 251.

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[3] It appeared during argument that Grant's insurer, Liberty Mutual Insurance Company, has instituted an action against Unitika Tsusho K.K. in the Supreme Court of the State of New York in New York County, but has yet to effectuate service of process on Unitika.

The motion of Unitika Tsusho K.K. to dismiss the third party complaint for lack of personal jurisdiction is granted. The Clerk will enter an order of dismissal.

Dated at Rutland, in the District of Vermont, this 27th day of October, 1977.

/s/ JAMES S. HOLDEN
James S. Holden
Chief Judge